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No. 10-740

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EMIGRANT SAVINGS BANK,

Petitioner,

vs.

METAVANTE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement for the Petitioner was set forth on page ii of the Petition and there have been no amendments to that statement.

TABLE OF CONTENTS

	Page
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
REASONS FOR GRANTING THE PETITION	1
I. CERTIORARI IS WARRANTED TO CLARIFY THE PROPER STANDARD FOR ADMISSION OF EXPERIENCE-BASED EXPERT TESTIMONY UNDER AMENDED RULE 702	1
A. The Seventh Circuit's Decision Conflicts with the Law in Eight Other Circuits	1
B. The Seventh Circuit's Decision Cannot Be Reconciled with Amended Rule 702	4
C. This Case Is an Ideal Vehicle to Resolve the Rule 702 Issue	5
II. CERTIORARI IS WARRANTED TO ADDRESS THE SEVENTH CIRCUIT'S MISAPPLICATION OF FEDERAL COMMON LAW TO AN ISSUE OF SUBSTANTIVE STATE LAW	6

Table of Contents

	Page
A. The Seventh Circuit Applied Federal Common Law Instead of Wisconsin's Substantive Definition of "Reasonable Fees"	6
B. The Circuits Are in Conflict	10
C. This Case Is an Ideal Vehicle to Ensure Strict Application of *Erie* Principles	11
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

Cases

A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 11

Aspen Servs., Inc. v. IT Corp., 583 N.W.2d 849 (Wis. Ct. App. 1998) 9

D.L. Anderson's Lakeside Leisure Co. v. Anderson, 757 N.W.2d 803 (Wis. 2008) 10

F.D.I.C. v. Bender, 182 F.3d 1 (D.C. Cir. 1999) 11

Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) 8

Glamann v. St. Paul Fire & Marine Ins. Co., 424 N.W.2d 924 (Wis. 1988) 10

Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004) 2-3

Herro, McAndrews & Porter, S.C. v. Gerhardt, 214 N.W.2d 401 (Wis. 1974) 9

Ideal Electronic Sec. Co. v. Int'l Fidelity Ins. Co., 129 F.3d 143 (D.C. Cir. 1997) 11

Cited Authorities

	Page
J.R. Simplot v. Chevron Pipeline Co., 563 F.3d 1102 (10th Cir. 2009)	11
Palmetto Health Credit Union v. Open Solution, Inc., No. 08-CV-3848, 2011 WL 11702 (D.S.C. Jan. 4, 2011)	8
Radford v. J.J.B. Enters., Ltd., 472 N.W.2d 790 (Wis. Ct. App. 1991)	9
Sec. Mutual Life Ins. Co. of N.Y. v. Contemporary Real Estate Assocs., 979 F.2d 329 (3d Cir. 1992)	7, 8
Touchett v. E Z Paintr Corp., 111 N.W.2d 419 (Wis. 1961)	9
Trustees of Chicago Painters Trust Funds v. Royal Int'l Drywall & Decorating, Inc., 493 F.3d 782 (7th Cir. 2007)	1
United States v. Conn, 297 F.3d 548 (7th Cir. 2002)	1, 2
United States v. Decoud, 456 F.3d 996 (9th Cir. 2006)	3
United States v. Hermanek, 289 F.3d 1076 (9th Cir. 2002)	3

Cited Authorities

Page

United States v. Mamah,
332 F.3d 475 (7th Cir. 2003) 2

United States v. Redlightning,
624 F.3d 1090 (9th Cir. 2010) 3

United States v. Vesey,
338 F.3d 913 (8th Cir. 2003) 1

United States v. York,
572 F.3d 415 (7th Cir. 2009) 2

Westar Energy, Inc. v. Lake,
552 F.3d 1215 (10th Cir. 2009) 10, 11

Wright v. Mercy Hosp. of Janesville, Wis., Inc.,
557 N.W.2d 846 (Wis. Ct. App. 1996) 9

Other Authorities

Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*,
93 Iowa L. Rev. 451 (2008) 2

Fed.R.Civ.P. 54, Advisory Comm. Note 7

Fed.R.Evid. 702, Advisory Comm. Note 2

Page

Goodwin, *The Hidden Significance of* Kumho Tire Co. v. Carmichael: *A Compass for Problems of Definition and Procedure Created by* Daubert v. Merrell Dow Pharmaceuticals, Inc., 52 Baylor L. Rev. 603 (2000) 3

Schwartz & Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2006) 3

Rules

Fed.R.Civ.P. 54 ..... 7, 12

Fed.R.Evid. 702 1-5

I. CERTIORARI IS WARRANTED TO CLARIFY THE PROPER STANDARD FOR ADMISSION OF EXPERIENCE-BASED EXPERT TESTIMONY UNDER AMENDED RULE 702

A. The Seventh Circuit's Decision Conflicts with the Law in Eight Other Circuits

Respondent Metavante contends that the circuits are not in conflict, arguing that the Seventh and Ninth Circuits apply the same, stricter standard to experience-based expert testimony as eight other circuits. Brief in Opposition ("Opp.") 15–16. In doing so, Metavante never questions application of the stricter standard by the latter courts, thus implicitly conceding that the higher standard is correct.[1] The Seventh and Ninth Circuits, however, pervasively apply a laxer standard.

1. The decision below perpetuated previous Seventh Circuit holdings conflating an expert's qualifications with reliability. *See Trustees of Chicago Painters Trust Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 788 (7th Cir. 2007); *United States v. Conn*, 297 F.3d 548, 557 (7th Cir. 2002). In *Royal*, the Seventh Circuit held two experts' testimony to be "sufficiently reliable" on the basis of qualifications alone. 493 F.3d at 788. In *Conn*, the Seventh Circuit approved the expert's "valid methodology...on the basis of his earlier training and experience," despite the court's acknowledgement

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1. Although the decision below cited *United States v. Vesey*, 338 F.3d 913, 917 (8th Cir. 2003), Opp. 16, the Seventh Circuit did so only for the proposition that an expert may be *qualified* by experience, 18a n.8, which the Petition does not dispute

that "no information was elicited about the nature of his training,...or other details of his experience." 297 F.3d at 557. These holdings abrogate Rule 702's requirements by omitting a key analytical step: "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed.R.Evid. 702, Advisory Comm. Note. These are the precise questions asked of experience-based experts by eight other circuits, but not by the Seventh Circuit.

Metavante asserts that *United States v. Mamah*, 332 F.3d 475, 477–78 (7th Cir. 2003), and *United States v. York*, 572 F.3d 415, 422–24 (7th Cir. 2009), show that the Seventh Circuit "appreciates" the distinction between an experience-based expert's qualifications and the reliability of her testimony. Opp. 15–16. *Mamah*, however, involved experts in an established academic discipline, 332 F.3d at 477–78, not experience-based experts, who pose unique problems. *See* Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 Iowa L. Rev. 451, 480 (2008) ("The most significant feature of [experience-based] testimony is that it has no *objective* basis."). *York* is also inapposite because the appellant did not challenge the expert's "qualifications, his methods, or the accuracy of his testimony." 572. F.3d at 422. The only contested issue was whether the expert could use a conversation's context to interpret "nine" to mean nine ounces of drugs, *id.* at 423–24, and that contextual issue is not germane to this case.

2. The Ninth Circuit also applies an impermissibly lax standard. Metavante never addresses *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d

998, 1018 (9th Cir. 2004), which held: "Given that, unlike scientific or technical testimony, the reliability of [the expert's] testimony was not contingent upon a particular methodology or technical framework, the district court did not abuse its discretion in finding [his] testimony reliable based on his knowledge and experience." Commentators have criticized this view as eviscerating Rule 702's reliability analysis. *See* Schwartz & Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 257 (2006) ("The Ninth Circuit has diminished the importance of *Daubert* by requiring only 'some kind of reliability determination' when considering non-scientific or non-technical expert testimony."); Goodwin, *The Hidden Significance of* Kumho Tire Co. v. Carmichael*: A Compass for Problems of Definition and Procedure Created by* Daubert v. Merrell Dow Pharmaceuticals, Inc., 52 Baylor L. Rev. 603, 635–36 (2000) ("Personal knowledge and experience, of course, are factors that qualify one to be a witness; they are not external reliability factors.... Under the Ninth Circuit's interpretation of *Kumho Tire*, experience can be the determinative reliability factor.").

Metavante cites *United States v. Redlightning*, 624 F.3d 1090, 1111–12 (9th Cir. 2010), Opp. 16 n.3, but that case involved a social-science expert relying on empirical data. Metavante also points to *United States v. Decoud*, 456 F.3d 996, 1013–14 (9th Cir. 2006), Opp. 16 n.3, but that case followed *United States v. Hermanek*, 289 F.3d 1076, 1093–94 (9th Cir. 2002), which the Petition acknowledged was in apparent conflict with *Hangarter*. Pet. 16 n.5. Despite the intra-circuit inconsistency, the erroneous view in *Hangarter*, and the Seventh Circuit's equally misguided reading of Rule 702, remains binding authority that has

provoked repeated critical commentary. This Court's review to resolve the circuit split on this issue of national importance is clearly needed.

B. The Seventh Circuit's Decision Cannot Be Reconciled with Amended Rule 702

Review also is warranted because the Seventh Circuit has ignored the plain text of Rule 702 by holding that experience-based expert testimony may be reliable on the basis of "experience rather than on data," without further analysis. 18a.

1. Metavante argues that Moffat relied on "key facts and data," Opp. 13–14, but the Seventh Circuit nowhere analyzed the sufficiency of that data. In any event, Moffat admitted at trial that he failed to consider numerous salient factors that would have affected his opinion on commercial reasonableness, including interest rates, the number of failed applications, and internal Metavante documents acknowledging deficient performance. (SA 651–55, 661); Pet. 6.

2. Metavante also claims that Moffat employed "reliable principles and methods" derived from his personal experience as a businessman. Opp. 14. The Seventh Circuit, however, noted only two instances of Moffat's experience—his management of an unspecified "development team" and his work at the Bank of New York—from which he drew the sweeping general conclusion that "businesses consider technological innovation satisfactory if it enables them to meet their business financial objective." 19a–20a & n.9. Metavante made no showing of how Moffat's limited experience was

similar or applicable to the Emigrant direct banking system. Metavante attempts to justify this deficiency by selectively quoting the Advisory Committee's Note, which states that "experience alone" may "provide a sufficient foundation for expert testimony." Opp. 15. But Metavante omits the crucial next paragraph, which qualifies the foregoing statement and requires the court to analyze how and why that experience leads to the conclusion reached—exactly the showing not present here. *See supra* at 2; Pet. 14.

C. This Case Is an Ideal Vehicle to Resolve the Rule 702 Issue

Metavante does not dispute that the Rule 702 question presented is one of recurring national importance. It makes unavailing arguments, however, that this case "is a poor vehicle for the Court to address the expert issue." Opp. 17.

1. Metavante asserts that Moffat relied on "sufficient facts or data" and applied "reliable methods and principles" to the facts. *Id.* Such conclusory parroting of the Rule's words cannot overcome the fact that the courts below did not properly evaluate the three reliability prongs of Rule 702. The district court conducted no analysis whatsoever, 17a, while the Seventh Circuit applied the mistaken view that qualification by experience establishes reliability. Thus, neither court ever considered the fundamental disconnect between Moffat's general business experience, his vague statement that technological innovation is satisfactory if it enables businesses to meet their financial objectives, and the highly particularized facts of this case involving the specialized field of online direct banking.

2. Metavante also would deny review because "the expert testimony had no bearing on the result of this bench trial." Opp. 17. But while the district court stated that Moffat's testimony did not "control the day," 79a–80a, in fact it cited Moffat's testimony *six times* to support the findings of commercial reasonableness (which it adopted verbatim from Metavante's submission). 133a–137a ¶¶ 66, 68, 71, 72, 81, 82. Indeed, the court found Moffat's testimony "instructive on a whole host of subjects," 79a–80a, and it relied solely on Moffat's testimony for its core finding that Metavante provided services in a commercially reasonable manner. 133a ¶ 66. Metavante cannot disown this tide of evidence. It demonstrates that Moffat's testimony had a real and potentially outcome-determinative effect on the case, rendering it an ideal vehicle to resolve the question presented.

II. CERTIORARI IS WARRANTED TO ADDRESS THE SEVENTH CIRCUIT'S MISAPPLICATION OF FEDERAL COMMON LAW TO AN ISSUE OF SUBSTANTIVE STATE LAW

A. The Seventh Circuit Applied Federal Common Law Instead of Wisconsin's Substantive Definition of "Reasonable Fees"

Interpretation of contract provisions is a matter of state substantive law. Wisconsin's unusual definition of "reasonable fees" highlights the disparity between state and federal law, and the Seventh Circuit's adoption of a substantive presumption or market-based definition of "reasonable fees" violates *Erie* and fundamental principles of federalism.

1. Metavante focuses on Rule 54, Fed.R.Civ.P., as authorizing the Seventh Circuit's procedural rule allowing redacted billing statements. Opp. 18–19. The Petition, however, does not question the Seventh Circuit's adoption of evidentiary procedures, nor does it challenge Rule 54 as exceeding the scope of the Rules Enabling Act. Rule 54, which governs the procedure for an attorneys' fees motion, is applicable regardless of whether substantive state or federal common law provides the rule of decision. *See* Fed.R.Civ.P. 54(d)(2)(B)–(C).[2]

A necessary corollary of *Erie*, however, is that a federal court may not apply "procedural" rules in such a way that they make it impossible to satisfy substantive state law standards. *See Sec. Mutual Life Ins. Co. v. Contemporary Real Estate Assocs.*, 979 F.2d 329, 332 (3d Cir. 1992). Thus, the Seventh Circuit effectively recognized its own violation of *Erie* by describing its rule as recognizing "the presumptive validity of market forces," and acknowledging that the rule produces different outcomes than would application of state law "factors" that govern the amount of fee awards. 50a–51a n.21, 53a. The presumption amounts to substantive law in this context.[3]

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2. Even if the requirements of Rule 54 were germane here, the Advisory Committee's Note expressly provides that while only the amount of fees sought need be included in the initial motion, "the evidentiary material bearing on the fees...*must of course be submitted in due course*." Fed.R.Civ.P. 54, Advisory Comm Note to 1993 Amendments to ¶ (d)2 (emphasis added). The courts below rejected Emigrant's request for that very material.

3. The district court erred in stating that although the issue of whether a party is entitled to contractual attorneys' fees is a matter of substantive law, under *Erie*, "the method of

2. Metavante argues that the Seventh Circuit's presumption is not irrebuttable. Opp. 29. In support, however, Metavante lists the very circumstances identified in the Petition that preclude invoking the presumption in the first instance. Pet. 27. Metavante cites no case where the presumption was applied and then was overcome. The Seventh Circuit's rule is effectively irrebuttable because it prevents the creation of a record, and is therefore a substantive rule of law.

3. Metavante asserts that the Seventh Circuit rule accords with Wisconsin law because both allow full recovery despite only partial success. Opp. 20. This argument is irrelevant, because whatever the details of Wisconsin law, federal courts must apply it to substantive matters rather than federal common law. Here, the courts below failed to do so because they applied the substantive presumption embodied in the Seventh Circuit's federal common law definition of "reasonable fees."

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quantifying a reasonable fee is a procedural issue governed by federal law." 64a. On the contrary, the method of quantifying is substantive. *See Gasperini v. Ctr. for Humanities, Inc* , 518 U.S. 415, 426–29 (1996); *Mutual Life*, 979 F.2d at 332 ("[T]o uphold the rationale of *Erie* require[s] that the method of determining attorneys' fees also be governed by state law."). Only the *manner* in which evidence is considered is procedural, as recently recognized by a court that rejected the Seventh Circuit's rule that fees are "presumptively reasonable by virtue of acceptance in the marketplace," and considered the factors required by state law. *Palmetto Health Credit Union v. Open Solution, Inc.*, No. 08-CV-3848, 2011 WL 11702, at *4–5 (D.S.C. Jan 4, 2011).

In any event, Metavante is wrong about Wisconsin law. The cases cited by Metavante applied statutory, not contractual, fee-shifting provisions. *See Wright v. Mercy Hosp. of Janesville, Wis., Inc.*, 557 N.W.2d 846, 855 (Wis. Ct. App. 1996); *Radford v. J.J.B. Enters., Ltd.*, 472 N.W.2d 790, 797 (Wis. Ct. App. 1991). In each of these cases, the plaintiff won on all claims against at least one defendant, and because damage liability was joint and several, so was liability for attorneys' fees. *See Wright*, 557 N.W.2d at 849–50, 855; *Radford*, 472 N.W.2d at 792–97. Thus, for purposes of awarding fees, the plaintiffs, unlike here, had achieved full success.[4]

Contrary to Metavante's argument, Opp. 23–24, Wisconsin law also requires consideration of several factors in determining a "reasonable fee." Trial courts will be reversed for "failing to give any weight to the character and importance of the legal work performed," or to the attorney's experience. *Touchett v. E Z Paintr Corp.*, 111 N.W.2d 419, 423 (Wis. 1961). Wisconsin further defines "reasonable fees" in terms of traditional lodestar factors. *See Herro, McAndrews & Porter, S.C. v. Gerhardt*, 214 N.W.2d 401, 404 (Wis. 1974) (describing "proper factors to be considered"); *Aspen Servs., Inc. v. IT Corp.*, 583 N.W.2d 849, 851 n.3 (Wis. Ct. App. 1998) (describing factors that "should be considered").

In arguing the contrary, Metavante cites a case where the plaintiff won in every respect, and the only issue was whether a contractual attorneys' fee provision was

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4. Metavante's related argument that Wisconsin's pro-rata calculation does not apply to "prevailing" parties, Opp. 21 n.5, is also wrong. Pet. 23.

broad enough to encompass a trademark claim. *See D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 757 N.W.2d 803, 822–23 (Wis. 2008). Metavante's argument that the court affirmed "without engaging in any discussion of the specific type of evidence required or factors that must be considered" reads too much into the court's silence on a question not presented. Opp. 22.

Finally, Metavante's argument that Wisconsin recognizes a presumption of reasonableness based on market factors is unsupported. Opp. 24–25. In the cited case, the court upheld using actual fees as the *starting point* for calculating an award when the trial court gave the opponent an opportunity to challenge the reasonableness of the fees. *Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924, 925, 927 (Wis. 1988). This case provides no support for the Seventh Circuit's substantive rule that market forces demonstrate a fee request's "presumptive validity." 53a.

B. The Circuits Are in Conflict

Metavante does not dispute that the Seventh Circuit's federal common law definition of "reasonable fees" conflicts with the law of the First Circuit. Pet. 33 n.18. Its efforts to deny a conflict with the Tenth and District of Columbia Circuits are unavailing.

1. Metavante asserts that there is no conflict with *Westar Energy, Inc. v. Lake*, 552 F.3d 1215 (10th Cir. 2009), because that case only considered burdens of proof.[5]

5. Even if *Westar* only addressed the burden of proof, that too is a substantive issue. Pet. 26–28.

Opp. 26–27. This misreads *Westar*, which held that "[t]he Kansas Supreme Court would...most likely require the party seeking payment to justify the reasonableness of the fees by reference to" specified factors. 552 F.3d at 1229. Metavante ignores the Tenth Circuit's subsequent explanation that it had "made clear in *Westar Energy* that state law determines the attorneys' fees standard" of reasonableness. *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1119 (10th Cir. 2009); *see* Pet. 32–33.

2. Contrary to Metavante's view, Opp. 28, "[a]lthough the District of Columbia is not a state, the [*Erie*] principle unquestionably applies." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1458 (D.C. Cir. 1995). While attempting to confine *Ideal Electronic Security Co. v. International Fidelity Insurance Company*, 129 F.3d 143 (D.C. Cir. 1997), to its facts, Opp. 28, Metavante fails to dispute *Ideal*'s holding that a federal court must look to local law for evidentiary standards and burdens. Pet. 33. Indeed, the D.C. Circuit, relying on *Ideal*, has held that, "upon request," a district court must require production of "contemporaneous time records." *F.D.I.C. v. Bender*, 182 F.3d 1, 5 (D.C. Cir. 1999).

C. This Case Is an Ideal Vehicle to Ensure Strict Application of *Erie* Principles

Metavante does not directly challenge Petitioner's demonstration that review is critical because the decision below drastically increases the impact of the Seventh Circuit's federal common law rule. Pet. 34–36. Metavante's truism that fee awards are "entirely contingent on prevailing on the merits," Opp. 31, does not ameliorate the prospective danger of forum-shopping due to the

Seventh Circuit's expanded doctrine, nor address the court's flouting of Wisconsin's long-established state policy of reducing excessive litigation. Pet. 28–29. Similarly, raising the fact that Petitioner removed this case to federal court, Opp. 30–31, ignores the related principle that a party should not be penalized for exercising its right to remove. Pet. 28.

Metavante also argues that this case is a poor vehicle because the contract required that fees be "determined by the court," yet Metavante fails to explain how this contractual language could eliminate the right to appellate review. Opp. 31.

Finally, review of this case would not "disembowel" Rule 54. *Id.* Rule 54 merely establishes procedures to be followed in determining fee claims regardless of whether the right to recover fees arises under federal or state law. Metavante's argument that federal courts would be burdened by applying the law of different states, *id.* at 32, ignores the fundamental choice made by the Court in *Erie* that, notwithstanding any burden, state substantive law must be applied in diversity cases.

CONCLUSION

For the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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